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No. 97-918

In the Supreme Court of the United States

OCTOBER TERM, 1997

LOVILIA COAL COMPANY, ET AL., PETITIONERS

v.

WESLEY HARVEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Director of the Office of Workers' Compensation Programs has permissibly interpreted the "material change in conditions" standard of 20 C.F.R. 725.309(d), as presently in effect, to permit consideration of a successive claim for black lung benefits if a coal miner can show that evidence relating to a period after the denial of a previous claim now establishes the existence of an element that (i) is necessary to prove entitlement to benefits and (ii) was adjudicated against the miner in the previous proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 109 F.3d 445. The decisions and orders of the Benefits Review Board (Pet. App. 26-33, 40-53) and the administrative law judge (Pet. App. 34-39, 54-55, 56-67) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1997. A petition for rehearing was denied on August 1, 1997. Pet. App. 95. On October 27, 1997, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including December 1, 1997, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (BLBA or Act), 30 U.S.C. 901 *et seq.*, provides for the payment of benefits to coal miners "who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a). In order to establish entitlement to benefits, a miner must prove (1) that he has pneumoconiosis, (2) that it arose out of coal mine employment, and (3) that he is totally disabled due to the disease. See 20 C.F.R. 718.202-718.204; see also *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 141 (1987). Pursuant to her broad authority under the Act, 30 U.S.C. 932(a) and 936(a), the Secretary of Labor has promulgated regulations governing the filing and adjudication of claims for such benefits. See 20 C.F.R. 725.301-725.422.

This case involves the Secretary's regulation governing "duplicate" claims—*i.e.*, any claim filed after the claimant's first application for benefits under the BLBA. 20 C.F.R. 725.309 (reprinted at Pet. App. 105-107). If the first application is still pending, the later claim "merge[s]" into it. 20 C.F.R. 725.309(d). If the original claim was finally denied less than one year before the later claim is filed, the later claim may be treated as a request for modification of the decision denying benefits. *Ibid.*[1] If, however, a subsequent claim is filed more than a year after final denial of the first application, the regulations provide that "the later claim shall also be denied, on the grounds of the

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[1] Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 922, as incorporated in the BLBA, 30 U.S.C. 932(a), permits a request for modification, up to one year after a denial of benefits, "on the ground of a change in conditions or because of a mistake in a determination of fact." See 20 C.F.R. 725.310.

prior denial, unless the [district director] determines that there has been a material change in conditions." *Ibid.*

2. Respondent Wesley Harvey worked in coal mines from 1930 until 1975. Pet. App. 1.[2] For the last ten years he worked for petitioner Lovilia Coal Company, which is therefore responsible for any liability on the present claim. *Ibid.*; 20 C.F.R. 725.493(a)(1).

Respondent filed his first claim for benefits under the BLBA in 1973. Pet. App. 1-2. After an initial denial, that claim was reopened under statutory authorization, but again denied. *Id.* at 2. Claims filed in 1983, 1984 and 1987 were similarly denied by the Department of Labor's Office of Workers' Compensation Programs (OWCP), on the ground that respondent had failed to establish any of the elements necessary to show an entitlement to benefits. *Id.* at 2, 57-58.

Respondent filed his present claim in 1990. The OWCP at first denied the claim on the ground that respondent had not demonstrated a "material change in conditions," as required by 20 C.F.R. 725.309(d) where a previous claim filed by the same claimant has been denied. Pet. App. 68-72. An administrative law judge (ALJ), however, overturned that decision. Applying the standard adopted by the Department's Benefits Review Board (BRB) in *Spese* v. *Peabody Coal Co.*, 11 Black Lung Rep. (MB) 1-174 (1988), the ALJ first determined that respondent's new medical reports, if credited, "could establish" that he was totally disabled by pneumoconiosis, and thus that he

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[2] On January 22, 1998, respondent's counsel notified the Court that respondent died on October 28, 1997. See page 8, *infra*.

had demonstrated a material change in conditions. Pet. App. 60-61. On the merits, the ALJ concluded that the evidence sufficiently established that respondent suffered from pneumoconiosis arising out of coal mine employment, that his physical condition had worsened to the point of total disability, and that the pneumoconiosis was a contributing cause of his disability. *Id.* at 61-67. The ALJ therefore ordered the payment of benefits commencing as of October 1, 1990.[3]

The Benefits Review Board vacated the ALJ's decision and remanded the claim for further consideration. Pet. App. 40-53. The Board agreed that respondent had established a material change in conditions under the *Spese* standard (*id.* at 46), and it upheld the ALJ's finding that he had pneumoconiosis (*id.* at 46-48). The Board also held that there was sufficient evidence to support a finding of total disability (*id.* at 48), but it concluded that the ALJ had failed to consider contrary evidence on that question, that there was insufficient evidence to support the ALJ's determination concerning when respondent became disabled, and that the ALJ should reconsider certain

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[3] In a request for reconsideration, Lovilia argued that any liability for benefits should be borne by the Black Lung Disability Trust Fund under 30 U.S.C. 932(c) and (j)(3), which provide for the transfer of liability on claims that were initially denied before March 1, 1978, but were later approved after the special review authorized by 30 U.S.C. 945. The ALJ held that those provisions did not apply to this case because Harvey's pre-1978 claim had been finally denied after review under Section 945. Pet. App. 54-55. The BRB and the court of appeals affirmed that holding (*id.* at 4-7, 43-44), and petitioners do not renew their argument on that point in this Court.

evidence concerning the cause of disability. *Id.* at 49-52.

On remand, the ALJ again awarded benefits. Pet. App. 34-39. The ALJ concluded that although the early medical reports in the record did not support a finding of total disability due to pneumoconiosis, later reports "reveal[ed] the progression of the disease to the point where it caused [respondent] to be totally disabled." *Id.* at 37. The ALJ explained that he placed greater weight on the opinion of the treating physician than on the contrary evidence, and noted that he had "rarely * * * seen a treating physician's opinion so well documented by records" of recent hospitalizations due to respiratory disease. *Ibid.* The ALJ further concluded that, although there were conflicting medical opinions on the point, the preponderance of the evidence supported the conclusion that Harvey's total disability was due at least in part to pneumoconiosis. *Id.* at 38. Because the record did not establish the date respondent became disabled, the ALJ awarded benefits as of March 1990, when the claim was filed. *Ibid.*; see 20 C.F.R. 725.503(b).

The BRB affirmed. Pet. App. 26-33. Agreeing that the opinion of respondent's treating physician was well reasoned and documented, the Board sustained the ALJ's conclusion that that opinion outweighed the contrary medical evidence. *Id.* at 31. The Board also sustained the ALJ's finding, in accordance with two out of three medical opinions, that respondent's disability was due at least in part to pneumoconiosis. *Id.* at 32.

3. The court of appeals affirmed. Pet. App. 1-25. Rejecting (*id.* at 7-10) petitioners' argument that respondent's 1990 claim was barred by principles of claim preclusion, the court concluded that respondent

had not sought to relitigate prior claims, but rather to establish entitlement to benefits based on a change in his condition since the earlier denials. *Id.* at 8. The 1990 application for benefits was a different claim from those previously denied, the court reasoned, because it was based on respondent's physical condition at a later time. *Ibid.* Observing that prior decisions under the BLBA had held that pneumoconiosis is a progressive disease, the court declined to entertain petitioners' argument that a claimant who did not go back to work in a mine after a denial of benefits "could never establish a [relevant] change in conditions." *Id.* at 9-10.

As to the appropriate standard for determining whether there had been a material change in condition within the meaning of 20 C.F.R. 725.309(d), the court joined other courts, and the Director of the OWCP, in rejecting the *Spese* standard on which the ALJ and the BRB relied. Pet. App. 10-11. The court agreed that the *Spese* standard violated claim-preclusion principles by permitting a claimant to establish a material change in conditions with evidence showing only that the original decision was incorrect, rather than that the claimant's condition had worsened since the original denial. *Ibid.* The court instead accepted the "one-element" standard articulated by the Director, under which a claimant must establish that he can now prove, using evidence relating to periods after the denial of earlier claims, at least one of the elements of entitlement to benefits that was previously adjudicated against him. *Id.* at 11-19.

The court rejected (Pet. App. 13) petitioners' argument that the Director's interpretation of Section 725.309(d) was not entitled to deference because it

differed from past positions or was a "mere litigating position." The court further held that the Director's interpretation did not impermissibly shift the burden of proof on entitlement to benefits from the claimant to the Director or a responsible coal company. Pet. App. 14-15. In addition, the court held that a "presumption" of material change based on "new evidence of disease or disability" was rational, both because pneumoconiosis is a progressive disease, and because evidence showing the present existence of an element previously held not to exist necessarily demonstrates a material change in conditions, if one assumes that the previous decision was correct when rendered. *Id.* at 16-17. The court agreed (*id.* at 17-18) that it was proper to require a showing of change with respect to only one element of entitlement, because conventional issue-preclusion principles do not accord preclusive effect to a particular finding if an alternative finding made in the same proceeding would have been independently sufficient to support the prior judgment. *Ibid.* Finally, the court rejected petitioners' contention that the Director's standard impermissibly created an "irrebuttable presumption." *Id.* at 18-19. The court of appeals accordingly "adopt[ed] the Director's one-element standard." *Id.* at 19.

The court determined that it could review the award of benefits in this case without remanding for application of the correct threshold test under 20 C.F.R. 725.309(d), because the ALJ's findings that respondent's respiratory status had worsened substantially since the denial of his previous application for benefits, and that the evidence showed total disability and pneumoconiosis, clearly established a material change in conditions under that test. Pet. App. 20-21. On the merits, the court concluded that

the award of benefits was supported by substantial evidence. *Id.* at 21-25.

ARGUMENT

1. Respondent Harvey's counsel has informed the Court that respondent died on October 28, 1997. The case is not moot, however, because the Director of the Office of Workers' Compensation Programs paid the benefits that were due to respondent under the administrative award at issue in this case. See 26 U.S.C. 9501(d)(1)(A); 20 C.F.R. 725.522(b). The Director is a statutory party to this proceeding, 30 U.S.C. 932(k), and he retains a direct monetary interest in having the award affirmed so that he may recoup from petitioners the payments previously made to respondent Harvey. See 30 U.S.C. 934(b); 20 C.F.R. 725.603, 725.608.

2. The court of appeals properly deferred to the Director's interpretation of 20 C.F.R. 725.309(d), under which a claimant may establish the "material change in conditions" that is required to permit consideration of a successive claim for black lung benefits by showing that new evidence (that is, evidence pertaining to the period after the previous denial) now shows the existence of at least one element, necessary to establish an entitlement to benefits, that was finally adjudicated against the claimant in the previous proceedings.[4] Petitioners contend (Pet. 3, 5, 26 n.15) that the Director's approach to successive black lung claims is inconsistent with the BLBA and with general principles of

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[4] The Director's position is incorporated and reflected in some detail in proposed amendments to the relevant regulation. See 62 Fed. Reg. 3395-3396 (Jan. 22, 1997) (proposed § 725.309(d)); see also page 17, *infra*.

claim and issue preclusion, because it permits the "reopening of finally denied * * * cases" and "eliminates finality" in the adjudication of black lung claims. The Court has previously denied review in a case presenting similar questions, see *Lisa Lee Mines* v. *Director, OWCP*, 117 S. Ct. 763 (1997) (No. 96-402), and there is no reason for a different result here.

Petitioners' argument confuses old and new claims for benefits. Under 33 U.S.C. 922 and 20 C.F.R. 725.310, an OWCP district director may reopen and modify a previously denied claim for benefits because of a mistake of fact or a change in conditions, if the claimant requests reopening within one year after the claim is denied. See note 1, *supra*. When a request to reopen is granted, the original claim is readjudicated, and benefits may be awarded from a date long before the previous denial. See *Eifler* v. *OWCP*, 926 F.2d 663, 666 (7th Cir. 1991); 20 C.F.R. 725.503(b).

The regulation at issue in this case, 20 C.F.R. 725.309(d), does not authorize the reopening of a previously denied claim. A subsequent claim that falls outside the one-year reopening period, like respondent Harvey's 1990 claim, is treated as a new claim, and benefits cannot be awarded for any period before the denial of the previously adjudicated claim. Entertaining such a new, but successive, claim does not contravene any finality rule contained in the LHWCA or the BLBA. See *Sharondale Corp.* v. *Ross*, 42 F.3d 993, 998 (6th Cir. 1994).

Moreover, in order to honor precisely the principles of claim preclusion on which petitioners rely, see *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988), Section 725.309(d) provides that any new claim must

be denied, solely on the basis of the previous denial, unless the claimant can show that there has been a "material change in conditions" since the time of the prior adjudication. See *Peabody Coal Co.* v. *Spese*, 117 F.3d 1001, 1007 (7th Cir. 1997) (en banc); *Wyoming Fuel Co.* v. *Director, OWCP*, 90 F.3d 1502, 1510 (10th Cir. 1996). Preclusion principles do not bar a later claim based on a change in the claimant's condition, because that claim is based on new circumstances (the claimant's physical condition at the time of the later adjudication) and rests on a new allegation that the miner is *now* totally disabled due to pneumoconiosis. See Pet. App. 8; *Lisa Lee Mines* v. *Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 763 (1997); *Labelle Processing Co.* v. *Swarrow*, 72 F.3d 308, 314 (3d Cir. 1995); see generally Restatement (Second) of Judgments § 24 cmt. f (1982); 8 A. Larson & L. Larson, *The Law of Workmen's Compensation* § 79.72(f) (1996) ("res judicata does not apply if the issue is the claimant's physical condition * * * at two entirely different times, particularly in the case of occupational diseases").

The adjudication of successive claims is also consistent with the principle of issue preclusion, which bars relitigation between the same parties of issues that were actually decided in a prior adjudication and were essential to the judgment. See Pet. App. 17; *Peabody Coal Co.*, 117 F.3d at 1008; *Lisa Lee Mines*, 86 F.3d at 1363; see generally *Baker* v. *General Motors Corp.*, 118 S. Ct. 657, 664 n.5 (1998); Restatement (Second) of Judgments § 27 (1982). Because a judgment that a miner does not have pneumoconiosis, or is not totally disabled by the disease, speaks to the miner's physical condition only at one point in time,

it cannot preclude a later judgment based on his condition at a later time. Moreover, where an earlier decision resolves multiple elements of a claim against a miner, but only one finding need be correct in order to sustain the denial of benefits, the factfinder's resolution of the other elements is not, under conventional issue-preclusion principles, conclusive in subsequent proceedings. See *Peabody Coal Co.*, 117 F.3d at 1008 ("holdings in the alternative, either of which would * * * support a result, are not conclusive in subsequent litigation with respect to either issue standing alone," in part because "a claimant who loses on three * * * alternate grounds has no incentive to take an appeal to 'correct' the agency on grounds 2 and 3 even if he thinks there was error, if ground 1 is unassailable"); Pet. App. 17-18; *Lisa Lee Mines*, 86 F.3d at 1363; see also Restatement (Second) of Judgments § 27 cmts. i & o (1982) (factual determination that is sufficient but not necessary to support result will be accorded preclusive effect only if an appellate court has specifically upheld it). Thus, so long as a claimant demonstrates a material change in one element previously resolved against him, he may properly be permitted to relitigate all elements in pursuing a subsequent claim.

Any finality rule that precluded a claimant from filing a claim for benefits on the basis of demonstrably changed conditions would produce perverse results. A miner who misjudged his condition and filed a claim prematurely would be forever barred from an award if the one-year period for reopening his original claim under 20 C.F.R. 725.310 had elapsed before his pneumoconiosis became verifiable or totally disabling. See *Lisa Lee Mines*, 86 F.3d at 1364 & n.14 (rule would place claimants in an "absurd dilemma"); *Sharondale*

Corp., 42 F.3d at 996. The Director's approach to a subsequent claim, by contrast, strikes a reasonable balance between the important interest in finality and the need to permit a miner to file a new claim if his condition worsens to the point at which he meets the statutory criteria for benefits. *Lisa Lee Mines*, 86 F.3d at 1364-1365.[5]

Petitioners take issue with the proposition that pneumoconiosis is progressive. Pet. 7. This Court and others have, however, repeatedly noted the progressive nature of the disease. See, *e.g.*, *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 151-152 (1987); Pet. App. 10; *Wyoming Fuel Co.*, 90 F.3d at 1507; *Lisa Lee Mines*, 86 F.3d at 1364; *Labelle Processing Co.*, 72 F.3d at 314; *Sharondale Corp.*, 42 F.3d at 996. Moreover, the Director, who is principally responsible for the interpretation and administration of the BLBA, has long taken the position that pneumoconiosis (as defined by the BLBA) is a frequently latent disease that may not become manifest until long after exposure ceases, and there is scientific evidence to support that position.[6] See 62 Fed. Reg. 3344 (1997) (restating position and citing studies); Gov't C.A. Br. 42 (same); *Labelle Processing Co.*, 72 F.3d at 314-315. If petitioners wish to suggest modification of the Director's view on the basis of a new "consensus among scientists today" (Pet. 17 n.9), the regulatory revision proceedings presently under-

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[5] The claimant must also file his claim within the limitation period prescribed by 30 U.S.C. 932(f).

[6] Even petitioners concede that "some" persons with pneumoconiosis "could have deteriorating health sufficiently related to black lung disease to warrant another evaluation" after an initial denial of benefits. Pet. 25.

way within the Department of Labor (see page 17, *infra*) would be a more appropriate forum in which to do so than the courts. Cf. *Peabody Coal Co.*, 117 F.3d at 1010 ("[i]n the end, the question [of] whether simple pneumoconiosis can progress in the absence of further exposure to coal dust is a question of legislative fact").[7]

2. Nothing in the Director's one-element test for entertaining new claims impermissibly shifts the burden of proof imposed on a benefits claimant by the Administrative Procedure Act (APA), 5 U.S.C. 556(d), or conflicts with this Court's decisions in *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267 (1994), or *Metropolitan Stevedore Co.* v. *Rambo*, 117 S. Ct. 1953 (1997). See Pet. 24-25. *Greenwich Collieries* invalidated the administrative "true doubt" rule, under which black lung benefits were awarded if the evidence for and against entitlement was evenly balanced, because that rule effectively shifted the ultimate burden of persuasion from the claimant to the party opposing a claim. *Id.* at 281. As the court below recognized (Pet. App. 14-15), however, the Director's "one-element" test for new claims does not alter the burden of persuasion; it simply clarifies what a claimant must show in order to establish a

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[7] We are informed that industry representatives have submitted relevant materials to the Department in the regulatory amendment proceedings, and that those materials are presently under review. We also note that petitioners here failed to incorporate in the record in this case any evidence to substantiate their contention that progression of respondent Harvey's pneumoconiosis was scientifically impossible. Compare *Peabody Coal*, 117 F.3d at 1010 (operator waived argument that simple pneumoconiosis is not progressive by failing to make a proper evidentiary record).

"material change in conditions" within the meaning of 20 C.F.R. 725.309(d). Cf. *Metropolitan Stevedore Co.*, 117 S. Ct. at 1963 n.9 (standard of proof "goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it * * *, but does not determine what facts must be proven as a substantive part of a claim or defense"). A claimant always retains the burden of proof, both on the threshold issue of whether there has been a sufficient change in conditions to justify a new adjudication, and on the ultimate issue of entitlement to benefits once new conditions are taken into account. See, *e.g.*, *Lisa Lee Mines*, 86 F.3d at 1362 (claimant must "*prove* * * * at least one of the elements previously adjudicated against him"); 62 Fed. Reg. at 3395-3396 (proposed § 725.309(d)); Pet. App. 38 (ultimate finding of entitlement in this case).[8]

3. As petitioners point out (Pet. 15-23), there is some disagreement among the courts of appeals

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[8] The one-element test does create a "presumption" of sorts: Once a claimant proves that evidence of his present condition satisfies an element of entitlement to benefits that a previous adjudication found he did not satisfy at an earlier time, it is presumed that his condition has, in fact, changed. See Pet. App. 18; 62 Fed. Reg. at 3352 (preamble), 3396 (proposed § 725.309(d)(3)). This amounts to no more than a presumption that the previous adjudication rested on correct factual determinations—a position fully consonant with the principles of claim and issue preclusion on which petitioners themselves rely. See, *e.g.*, *Lisa Lee Mines*, 86 F.3d at 1363. Moreover, the responsible employer could attempt to rebut the presumption by showing that the previous adjudication was clearly erroneous. Pet. App. 12; see also 62 Fed. Reg. at 3352 (preamble), 3396 (proposed § 725.309(d)(3)). At the very least, there is a "rational connection between the fact proved and the ultimate fact presumed." *Mullins Coal Co.*, 484 U.S. at 159 n.32.

concerning the proper standard for determining whether a miner has established a "material change in conditions" within the meaning of 20 C.F.R. 725.309(d). Any difference in approach under the present regulation does not, however, warrant further review in this case.

The decision below in this case comports with decisions of the Third, Sixth, Fourth and Seventh Circuits, all of which have endorsed the basic contours of the Director's "one-element" test as a reasonable interpretation of current Section 725.309(d). *Peabody Coal Co.*, 117 F.3d at 1009; *Lisa Lee Mines*, 86 F.3d at 1363; *Labelle Processing Co.*, 72 F.3d at 318; *Sharondale Corp.*, 42 F.3d at 997. Indeed, although the Seventh Circuit's decision in *Sahara Coal Co.* v. *OWCP*, 946 F.2d 554 (1991), had been read by some to conflict with the Director's approach (see *Peabody Coal*, 117 F.3d at 1005 (citing cases and noting that "a number of our sister circuits appear to have misunderstood what we require"); see also Pet. 15-16), in *Peabody Coal* a unanimous en banc court made clear its agreement that a "material change in conditions" has been shown so long as "at least one element that might independently have supported a decision against the claimant has now been shown to be different (implying that the earlier denial [of benefits] was correct)." 117 F.3d at 1009.

The Tenth Circuit has, however, rejected the one-element test as an interpretation of the present regulation, holding instead that "in order to bring a duplicate claim, a claimant must prove for *each* element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." *Wyoming Fuel Co.*, 90 F.3d at

1511 (emphasis added). Thus, the Tenth Circuit requires that a comparison of new evidence with that previously presented show a material deterioration in the miner's condition with respect to each previously adjudicated element. *Id.* at 1512. On the other hand, unlike the one-element test, the Tenth Circuit's rule requires only a showing of material deterioration, not a threshhold finding that the new evidence actually establishes the existence of any one element of the new claim. *Id.* at 1511-1512.[9]

The resolution of the present case does not turn on these differences in approach. The ALJ in this case concluded that "[t]he early medical reports are not indicative of total disability due to pneumoconiosis[;] however, the later reports reveal the disease and the latest medical documents present convincing evidence of total respiratory disability * * * with pneumoconiosis being a contributing cause." Pet. App. 37; see also *id.* at 62, 66 (discussing medical reports submitted in connection with prior denied claims). Thus, as to both of the elements that are critical here—the existence of pneumoconiosis and total disability—the ALJ did compare the medical evidence in the new and old proceedings, and he found a material change with respect to each element. There is therefore no reason to suppose that the outcome of this case would have

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[9] The Sixth Circuit has also suggested that some re-examination of prior evidence may be necessary even under the one-element test. *Sharondale Corp.*, 42 F.3d at 999 (ALJ must consider on remand whether x-rays submitted in support of second claim "differ qualitatively" from those submitted in first proceeding). The exact import of that suggestion is not entirely clear.

been any different if the appeal had been taken to the Tenth Circuit.[10]

In any event, there is no reason for this Court to resolve any conflict concerning the interpretation of the present "material change" regulation. As noted above, the Department of Labor has issued proposed regulations that will, if finally adopted, clarify and codify the Director's one-element standard. See 62 Fed. Reg. at 3395-3396 (proposed amended Section 725.309(d)); *id.* at 3351-3352 (preamble explanation). The comment period on the Department's proposed amendments to Section 725.309(d) (which are part of a comprehensive revision of related regulations) has closed, and the Department is in the process of considering the comments received, which include many of the same objections to the one-element standard that are raised in the present petition.[11] Whether or not those objections result in any modification of the one-element test set out in the proposed regulations, the promulgation of final regulations should reduce or eliminate any remaining disagreement among the courts of appeals, and would in any event provide a

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[10] Petitioners contend (Pet. 22) that the Fourth Circuit's decision in *Lisa Lee Mines*, 86 F.3d at 1363-1364, conflicts with other decisions because it refuses to permit a party opposing benefits to rely on the evidence in prior proceedings to rebut the inference raised by the one-element test that there has been a material change in conditions. Petitioners may not rely on any such conflict to seek review in this case, however, because the court below agreed with the Director that any presumption created by his standard is rebuttable. Pet. App. 12, 19.

[11] Those comments include, for example, the American Bar Association resolution on which petitioners rely (see Pet. 3, 24-25).

more appropriate backdrop for any further consideration of the matter by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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